DR ANG ENG LIP

v.

JUNE DANIEL AMARANICKRAMA

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: 24-131 OF 1995]
19 NOVEMBER 1996

CONTRACT: *Oral agreement - Admissibility of evidence - Oral agreement alleged to have been made prior to written agreement - Whether admissible - Whether necessary to resort to extrinsic evidence if terms of written agreement were clear - Evidence Act 1950, ss. 91,92 - Whether goodwill part of contract - Whether independent valuer required*

SUCCESSION: *Administrators - Duties of - Sale of assets of estate - Delay by administrator to transfer assets to purchaser - Whether value of assets reasonable - Whether court should order transfer of assets*

WORDS & PHRASES: *"Clinic" - Whether immovable property - Whether mere asset - Interpretation Act 1967, s. 3*

The plaintiff purchased a medical clinic from a company known as Physician's Clinic Sdn Bhd Melaka for RM175,000. The terms of the agreement dated 30 August 1989 ('the first agreement') provided for the sale to the plaintiff of: (i) the goodwill and practice of the late Dr LJ Rao ('the deceased') at the clinic in the Straits Hospital, Melaka; (ii) the medicine, equipment and fittings (not including the Aloka Sector Scan) in the clinic; and (iii) the 40,901 shares of Wisma Medical Centre (Melaka) Sdn Bhd, the operator of the Straits Hospital which was registered in the name of the deceased ('the shares'). An additional sum of RM27,435 was paid for the Aloka Sector Scan. The full payment of RM175,000 and the additional of RM27,435 were made on 11 August 1989, before the execution of the agreement and the share certificates were forwarded to the plaintiff's solicitors.

The defendant was the administratrix of the deceased's estate, of which some beneficiaries were minors. Due to this fact, the defendant executed another agreement with the plaintiff ('the second agreement') in respect of the same items as in the first agreement, with additional clauses providing that: (i) the defendant was to apply for letters of administration and the approval of the court to sell the shares to the plaintiff who had paid the full purchase price; (ii) the defendant was to transfer the shares to the plaintiff after obtaining the court's approval; and (iii) the plaintiff was the beneficial owner of the shares

as from 11 August 1989. Although the defendant was issued with the letters of administration on 2 March 1993, she failed to carry out the obligations under the second agreement and the plaintiff applied for orders that: (i) the defendant be allowed to sell the shares to the plaintiff; (ii) the defendant to transfer the shares to the plaintiff; and (iii) the defendant should execute the share transfer forms within seven days of the court order.

The defendant's counsel, in opposing the application, argued that the application should be refused as there were several unresolved matters under the first agreement. These were the existence of an oral agreement to appoint an independent valuer to value the goodwill of the deceased at the clinic, and a portable heart machine valued at RM15,000 which had not been paid for and which did not form part of the equipment included in the RM175,000 purchase price.

Held:

[1] It could not be denied that the alleged oral agreement was prior to the written agreement of 30 September 1989. It was clear that evidence of the negotiations and all communications subsequent to the contract was extrinsic evidence which was inadmissible in law under ss. 91 and 92 of the Evidence Act 1950. In any event, the two agreements were crystal clear and there was no need to resort to extrinsic evidence for assistance.

[2] It was the duty of the defendant, to obtain the best possible value for the shares. In order to protect the rights of beneficiaries, the court had to ensure that a reasonably good price had been obtained for the shares, that the defendant had acted with proper prudence, that the price was reasonable at the date of hearing and also that the contract was as a whole favourable to the beneficiaries. There was nothing in the evidence to indicate that the price paid for, for the shares was unreasonable and applying the common sense rule, the court saw no reason to reject the value as agreed between the parties, especially as that value had been accepted by the Collector of Estate Duty for the purposes of estate duty.

[3] Having construed the agreements as a whole and noting the specific exclusion of the Aloka Sector Scan, the court was satisfied that the portable heart machine was within the ambit of the agreements and was included in the purchase price.

[4] Although no time period was prescribed in the agreements, the transfer ought to have been done within a reasonable time. Section 60(2) of the Probate and Administration Act 1959 did not apply as the term clinic was not within the definition of 'immovable property' pursuant to s. 3 of the

Interpretation Act 1967. It was not a land and permanent attachment pursuant to such as a building, but was merely an asset owned by a company. In light of the above, the defendant was ordered to transfer the shares to the plaintiff within seven days of the service of the order.

[Application allowed.]

Cases referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 2 Privy Council Cases Malaysia 117 ***(cit)***

Bank of Australasia v. Palmer [1897] AC 540 ***(foll)***

Che'ah & Che Yang Kelsom v. Che Ahmad [1941] MLJ 105 ***(cit)***

Foo Tock Lin v. Piong Kew [1963] 29 MLJ 67 ***(foll)***

Hj Saud v. Haji Ahmad & Anor [1957] MLJ 50 ***(cit)***

In Re Hoyles [1911] 1 Ch. 179 ***(refd)***

James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583 ***(foll)***

Joseph Zammit Bonett & Ors & Joseph Axisa & Ors [1951] AC 62 ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 ***(refd)***

L Schuler AG v. GV Wickman Tool Sales Ltd [1973] 2 All ER 39 ***(foll)***

Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***

Re The Estate of Tunku Mohamed Jewa Ibni Almarhum Sultan Abdul Hamid, Deceased Tunku Ismail bin Tunku Mohamed Jewa & Anor v. Tunku Baharom bin Tunku Mohamed Jewa & Ors [1982] 2 MLJ 44 ***(cit)***

Re Thomas Bartley v. Thomas [1911] WN 143 ***(cit)***

United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors [1990] 1 MLJ 280 ***(foll)***

Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1984] 1 MLJ 23 ***(foll)***

Legislation referred to:

Evidence Act 1950, ss. 45, 91, 92
Interpretation Act 1948 & 1967, s. 3
Probate and Administration Act 1959, s. 60(2)
Trustee Act 1949, s. 59(2)(d)

Other sources referred to:

Law Of Evidence, Sarkar's, p 774
The Dictionary of English Law, Earl Jowitt, (1965), p 937
The Oxford Companion To Law, David M Walker, p 600

For the applicant - Thara Singh; M/s Thara Singh Sidhu
For the respondent - D'Cruz; M/s SK Khoo & Tan Tian Tiok

Reported by Anne Khoo

JUDGMENT

Suriyadi Halim Omar J:

On 10 August 1989 the Physician's Clinic Sdn. Bhd. Melaka (hereinafter referred to as 'the vendor') resolved to sell its clinic called Clinic No. 6 of Straits Hospital Melaka to one Dr. Ang Eng Lip (hereinafter referred to as 'the purchaser'). This resolution eventually was formulated into a written agreement on 30 August 1989 (encl. 13 exh. JDA1). In consideration of a deposit sum of RM17,500 the vendor was to sell and the purchaser to buy

1. the goodwill and practice of the late Dr. L.J. RAO at the clinic in the Straits Hospital, Melaka;

2. The medicine, equipment and fittings (not including the ALOKA SECTOR SCAN) in the clinic; and

3. The Shares of Wisma Medical Centre (MELAKA) Sdn. Bhd., the operator of the Straits Hospital, totalling 4090l, presently registered in the name of the late Dr. L.J. RAO.

Under cl. 2 a further sum of RM157,500 was to be paid on the day the agreement was duly executed. Despite the unusualness of this provision the full purchase price of RM175,000 was paid by 11 August 1989 even before the ink of JDA1 had dried up. Aside from this payment pursuant to cl. 4 an additional sum of RM27,435 was paid on 11 August 1989 for an equipment called the Aloka Sector Scan many days before its execution. As evinced from the documents, on the same date the share certificate collectively numbered 38 for the 40901 shares in Wisma Medical Centre (Melaka) Sdn. Bhd. was forwarded by M/s. Tay Liong Siak & Co. lawyers for the defendant to Dr. Ang's solicitors. This speedy completion of the sales and purchase even before 30 August 1989 must be due to the strict compliance of cl. 5 which requires the contract's completion on or before 15 August 1989. For completeness it must be reminded that cl. 3 provides the non-inclusion of the assets and liabilities of the vendor or the clinic in cl. 1 (although no inhibition is placed over the other clauses).

It transpires that the late Dr. L.J. Rao's estate is being administered by June Daniel Amaranickrama. She obtained the Grant for Letters of Administration on 2 January 1990 though issued only on 2 March 1993. I was informed that some of the beneficiaries are minors and due to this the administrator on 30 September 1989 signed another agreement with the plaintiff principally over the same items for RM175,000 as agreed in the first agreement. Additional to this second agreement (encl. 2 exh. A), *inter alia* are these clauses *viz*.

1. the vendor is to apply for letters of administration **and approval from the High Court at Melaka to sell the shares to the purchaser** who has paid the full purchase price in full on 11 August 1989;

2. the vendor is to transfer the prescribed transfer forms to the purchaser after having obtained the approval of the High Court; and

3. the purchaser is the beneficial owner of the shares as from 11 August 1989.

By this second agreement (hereinafter called the 'second agreement') the parties specifically agreed to have the vendor (i.e. the administrator) to obtain the High Court's approval. This extra condition was specifically for sub-cl. 3 which dealt with the shares thus leaving out the other assets. Unfortunately eventhough June Daniel Amaranickrama undertook to apply to the High Court for approval and despite having been issued with the Grant for Letters of Administration on 2 March 1993 she never did so. After waiting frustratingly for many years the plaintiff purchaser eventually took it upon himself to enforce the agreements. The orders sought for by the plaintiff are, that:

1. the defendant be allowed to sell the shares in Wisma Medical Centre (Melaka) Sdn Bhd totalling 40901 presently registered under the name of the late Dr. L.J. Rao to the plaintiff;

2. the defendant transfers the shares to the plaintiff; and

3. that the defendant execute the share transfer forms to the plaintiff within seven days of the Court's order.

Mr. Thara Singh Counsel for the plaintiff in this case has not minced his words when applying for the above orders. In a gist he rebuked that:

1. the full sum of RM175,000 has been fully paid;

2. the shares have been handed over to the plaintiff (though not legally registered);

3. the buyer has taken possession of the premises;

4. the contracts are complete, crystal clear and unambiguous;

5. it is encumbent upon the defendant to obtain the Court's approval but has done nothing about it;

6. from 30 September 1989 until now there is absolutely no mention of the issue of goodwill and the heart machine; and

7. the issues of goodwill and the heart machine are merely an attempt to delay and deprive the plaintiff of his beneficial rights.

Mr. D'Cruz for the defendant has expressed indignation over the views of the plaintiff that the agreements are complete which do not require any other extrinsic evidence to clarify matters. In support of his indignation he highlighted that:

1. an oral agreement does exist as expressly mentioned by 30 September 1989 agreement;

2. certain assets namely the goodwill of the late Dr. L.J. Rao at the clinic and the heart machine (valued at RM15,000) have not been resolved and are not part of the RM175,000 consideration sum;

3. there are minor beneficiaries involved; and

4. the above issue of goodwill cannot be resolved unless the assistance of an independent valuer is sought in order to assist the Court greatly before arriving at a judicious decision. (In a nutshell the agreement pre-supposes the advice of an independent valuer).

In support of the defendant's contention that the issue of the controversial goodwill is not over yet, Mr. D'Cruz referred me to encl. 18 which is the affidavit of the plaintiff, indicating the liabilities of the clinic totalling RM6,439.18 (whilst RM400 is an asset). Page 12 of the same enclosure was also referred whereat the defendant also admitted liability up to RM3,000 as full and final settlement of the abovementioned liabilities. By bringing these matters to my attention the defendant hopes that I will be inclined to her argument that there are still some matters unresolved and of which the oral argument is a relevant point of reference. He canvassed that the oral agreement will greatly assist the Court in arriving at a conclusion that the contract pre-supposes the need of an independent valuer. Of course Mr. Thara Singh vehemently denies that an oral agreement requiring an independent valuer ever existed even from the initial stage. Pursuant to the affidavit of the defendant as stated in encl. 7 para. 2 the latter has not denied that the goodwill was sold. Additional to the above, the learned counsel for the defendant, asserted that the portable heart machine valued at RM15,000 is a separate item and has not been included in either of the agreements. The plaintiff on the other hand says otherwise.

Having heard the submission of both the parties and to avoid being derailed or side-tracked by red-herrings and irrelevencies I have decided to take the initiative by personally studying the available evidence. After perusing the fine prints in the two sets of documents I have emerged satisfied that they are

complete, plain and crystal clear. In the process I did consider the necessity of whether I should consider extrinsic evidence to assist me but eventually decided against it. I am hard pressed to do so in the light of ss. 91 and 92 of the Evidence Act 1950 which read:

Section 91 reads:

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Section 92 reads

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, **no evidence of any oral agreement or statement shall be admitted** as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms
>
> Provided that -
>
> (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, imtimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
>
> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;
>
> (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

Further for purposes of this point in the case of *Bank of Australasia v. Palmer* [1897] AC 540 at p. 545 endorsing the agreed opinion of the opposing Counsel Lord Morris expressed

> that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.

Later the opinion of Lord Morris was cited with favour by Thompson CJ in *Foo Tock Lin v. Piong Kew* [1963] 29 MLJ 67 when he indicated the inadmissibility of parole evidence in the following manner:

> .... if such evidence was admissible then no written contract would ever be accepted by the parties to it as something binding on them because it would be always open to one of them when it suited him to say: "Well I signed this. I understood it. I signed it consciously but I signed it with the mental reservation that if necessary I would not accept it as binding upon me." If such evidence were admissible to invalidate a written contract then the whole fabric of our commercial life would fall to the ground.

What cannot be denied is that the supposed oral agreement was prior to the written agreement of 30 September 1989 which finalised the oral agreement, also prior to 15 August 1989, by which date the sale and purchase of the Clinic No 6 in the Straits Hospital Melaka had been completed. From the facts and the available evidence I must conclude that the terminology "orally agreed" must either mean an oral agreement which had already crystalised in their minds on 1 August 1989 or a stage where parties were still negotiating the terms prior to the signing of the documents. I have dealt with the issue of the oral agreement above. Now I will deal with matters relating to the evidence of negotiation *vis-a-vis* that of the agreement of 30 August 1989. Lord Wilberforce at p. 241 in *Prenn v. Simmonds* [1971] 3 All ER 237 said

> In my opinion, then, **evidence of negotiations,** or of the parties' intentions, and a *fortiori* of Dr Simmonds's intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

Mohamed Azmi FJ in more succinct and articulate terms in *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte. Ltd* [1984] 1 MLJ 243 at 247 said:

> For the construction of a written agreement the established doctrine is firstly to **exclude evidence of negotiations leading up to the contract on the ground** that it is only the final agreement which records a consensus and as such **evidence of negotiations is unhelpful;**

Perhaps it is appropriate for me to touch now on the issue regarding the assets and liabilities of the clinic which has been brought to my attention by Mr. D'Cruz. In line with the above conclusions with regard to extrinsic evidence I must similarly treat this submission and reference to subsequent documents with disdain. These subsequent documents are mere exchanges and communications between parties after 30 September 1989 which falls squarely with the dicta of Lord Reid at p. 603 in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* [1970] AC 583 where he said:

> I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

Subsequently this case was applied in the case of *L Schuler A.G. v. G.V. Wickman Tool Sales Ltd.* [1973] 2 All ER 39. It is sufficient if I reproduce the *Per Curiam* at p. 40 which reads:

> In construing a contract, whether to resolve an ambiguity or for any other purpose, the court is not entitled to take into account the conduct of the parties subsequent to the execution of the contract as throwing light on the meaning to be given to it

As at this stage I have concluded that for purposes of our case the oral agreement, the evidence at the negotiation stage and all communications subsequent to the contract are extrinsic evidence which are inadmissible in law. Now I need only to dispose off the issue below.

Whether The Argument Of The Defendant That Prior To The Approval Of The Court The Concept Of Pre-supposition Of The Requirement Of An Independent Valuer Can Be Considered.

The defendant further indicated that as the court's approval is not automatic, it pre-supposes an additional assistance, in the form of an independent valuer. While the hearing was in progress, I was not unaware of the persistent usage of that word "pre-supposes" by the defendant, despite the eerie silence of it,

in both the agreements. I was also not unaware that if I were to accede to the submission of the defendant it would tantamount to interpreting both the contracts as conditional contracts. Regardless of the interpretation of the contract, from the point of view of the defendant, it cannot be denied that the contract requires the approval of the court but only in so far as the issue of the shares as expressed by the contract. It must be implied that both parties are aware that the performance of the contract is eventually subject to the benevolent nod of the court (para. 1 of exh. A).

To resolve the issue of this pre-supposition concept as mooted by Mr. D'Cruz I would like to make reference to the case of *United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280.

In this case there was an apparent "understanding" between the plaintiff's manager with the defendants arising from a representation that the plaintiff would only proceed against the defendants for any sums due and owing by the customer to the plaintiffs after the plaintiff had taken action against the customer company by enforcing a charge as security for some banking facilities. His Lordship Edgar Joseph Jr. J (as he then was) opined that:

> ... it is my opinion that the effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss. 91 and 92.

I must admit that this case crossed my path with no help of counsels while pursuing my research. I did toy with the idea whilst in the midst of my research that the terminology used by Mr. D'Cruz i.e. "pre-supposes" could possibly be equivalent either with the term "understanding" as discussed by Edgar Joseph Jr J (which comes within the definition of extrinsic evidence) or to an implied term. After due deliberation I now am satisfied that in the context of his submission it must mean an implied term which requires fulfillment, or the court will otherwise be incapable of arriving at the fair value of the factor of goodwill (see s. 45 of the Evidence Act and p. 774 of S*arkar's Law of Evidence*). Regarding this I refer again to the dictum of Mohamed Azmi FJ in *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte Ltd (supra)* where at p. 247 he said:

> For the construction of a written agreement ... firstly to exclude evidence of negotiation ...; and secondly to exclude evidence of the parties subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible.

Since a subjective interpretation of the agreement by a party, and in relation to this case by the defendant, is inadmissible the court thus will have to peruse the very two agreements themselves to decipher their intention. If by chance the view of any of the parties is in tandem with my interpretation then that is coincidental.

Before touching on the issue of goodwill permit me to discuss the shares first. I must stress that it is the duty of the administrator to obtain the best possible value of the shares of the deceased especially when the rights of minors are at stake. If all the beneficiaries are *sui juris* and have consented to the contract then it can be assumed that the consideration sum agreed is the best obtainable. As it is here no independent valuer gave any views which simple common-sense can highlight its necessity. On this point of applying the common-sense rule I refer to the comments of Syed Agil Barakbah FJ in the case of *Yap Yoke Luan & Ors. v. Ong Wee Tok & Ors.* [1984] 1 MLJ 23 at p. 25 where he remarked:

> It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, **the administrators should have applied the common-sense rule of calling for a valuation report**. That would have assisted them in considering whether the purchase consideration they had agreed upon was reasonable as the best possible price.

It must be implied that the administrator must have known that she took the risk of losing out to any bargain or having the contract vitiated unless approval was obtained from the court. Again *Yap Loke Luan & Ors v. Ong Wee Tok & Ors. (supra)* is referred to where Syed Agil Barakbah FJ at p. 25 said:

> In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the Court before it could be carried into effect and they had taken the risk of losing their bargain if the Court refused to grant such approval. The duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale.

From all the above cases and *dicta* the court is thus duty bound to ensure that the rights of the beneficiaries are protected. To arrive at this end not only must I ascertain that a reasonably good price had been obtained for the shares,

that the administrator had acted with proper prudence, that the price is reasonable at the hearing date but also that the contract as a whole is favourable to the beneficiaries. Perusing the affidavits and the exhibits there is nothing to indicate that the sum paid for the shares are unfair and unreasonable. In fact on this issue the defendant has been absolutely quiet and has not made any attempt to suggest that the shares be re-valued. Applying the common-sense rule I see no reason to reject the value as agreed by both parties, especially in the light of the acceptance of their value by the Collector of Estate Duty Tanah Melayu for purposes of estate duty, and the court when granting the letter of administration. I must further add that scrutinising the above dictum the guidelines are illustrative and not exhaustive.

Eventhough the contracts appear to be in order where both parties had entered them with their eyes wide open, it is unfortunate that the lackadaisical attitude of the administrator, has put the beneficiaries in such a stressful and distressing predicament. Although time is mentioned to be of the essence of these agreements, though not the time period to bring the matter to the attention of the court, for purposes of this case it must be implied that it ought to be done within a reasonable time (see *Aberfoyle Plantations Limited v. Khaw Bian Cheng* [1959] 2 Privy Council Cases Malaysia 117). Her inactivity as the administrator is without just cause which has resulted in this unnecessary court action by the plaintiff, much to the plaintiff's detriment in terms of cost. Fortunately for the estate, no thanks to the negative attitude of the administrator, I am still duty bound to ignore her inadequacies but merely to protect the beneficiaries. In fact the interest of the purchaser as said earlier is irrelevant however unfair it may appear on paper (see also *Che'Ah and Che Yang Kelsom v. Che Ahmad* [1941] MLJ 105; *In Re The Estate Of Tunku Mohamed Jewa Ibni Almarhum Sultan Abdul Hamid, Deceased Tunku Ismail bin Tunku Mohamed Jewa & Anor. v. Tunku Baharom bin Tunku Mohamed Jewa & Ors.* [1982] 2 MLJ 44; Section 59(2)(d) Trustee Act 1949 (act 208). Even if it leaves a poor taste in my mouth due to her negligence the overriding duty is still to obtain the best price for the benenficiaries (see *In Re Tunku Mohamed Jewa, deceased (supra)* when dissecting the case of *In Re Thomas Bartley v. Thomas* [1911] WN 143

An argument worthwhile mentioning is that of the defendant's submission which pertains s. 60(2) of the Probate and Administration Act 1959 (Act 97). Without further ado I must say that with regard to the shares this section is inapplicable. Perhaps this is the right time too to discuss this section in relation to the clinic which has been stranuously argued by the defendant's counsel to be an immovable property. This relevant section reads:

> Unless the Court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased; and subject as aforesaid, where there are several personal representatives the powers of all may, in the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.

This section created some confusion in my mind as physically speaking what were sold in the agreement were items which were movable/chattels *viz* medical equipment, medicine and shares at one end and the untouchable and formless goodwill but with a value, at the other end. The defendant interestingly said the term "immovable" was wide enough to cover the situation in this case as what was sold was a physical clinic. It was submitted by the plaintiff that what was sold was not the land or part of the building but a practice with its facilities. It is unfortunate that parties are unable to assist me as to the meaning of "immovable property" and as such again I have to resort to my own initiative and research. I begin with *The Dictionary of English Law* by Earl Jowitt (1965) at p. 937 which reads:

> "immovable", not to be forced from its place, the characteristic of things real, or land.

The Interpretation Act 1967 (Act 23) under s. 3 reads

> "immovable property" means land and any interest in, right over or benefit arising or to arise out of land;
>
> "land" includes -
>
> (a) the surface of the earth and all substances forming that surface;
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> (b) the earth below the surface and all substances therein;
>
> (c) all vegetation and other natural products, whether or not requiring the periodical application of labour to their production and whether on or below the surface;
>
> (d) all things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface; and
>
> (e) land covered by water.

The Oxford Companion To Law by David M. Walker at p. 600 interprets "immovable" as:

> Immovable. That which cannot physically be moved, particularly land and things attached to land, such as buildings. In foreign legal systems and in international private law the basic distinction of objects of proprietary rights is into immovable and movable, corresponding generally but not exactly to the

> distinction into real and personal of the common law. Thus leaseholds are a right in immovable property though, by English law, classified as personal property.

In the case of *In re Hoyles* [1911] 1 Ch. 179 at 183 Cozens Hardy M.R. approving the views of legal text book writers said:

> Putting aside this doubt, I think a mortgage debt secured by land is to be regarded, not as a movable, but as an immovable. The authority of text-writers is strongly in favour of this view. **Story,** s. 447, expressly includes "charges on lands, as mortgages," as in the sense of the law immovables and governed by the *lex rei sitae*; and **Dicey states that "immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests"** (Dicey, 2nd ed. p. 76; see also p. 496)." (This definition was endorsed by Russell J. in *In re Berchtold* [1923] Ch 192 at page 205).

After due deliberation it is my view that the main ingredient of s. 60(2) i.e. the term "immovable property" certainly does not apply to the clinic in this case as it does not possess the ingredients of immovability be it in the nature of any rights or interests. Undoubtedly had the sale included the clinic the land and the building the story would have been different and the permission of the court would have been required (see *Haji Saud v. Haji Ahmad & Anor.* [1957] MLJ 50). If I may elucidate further, the sale of the clinic does not entail a sale of a piece of real estate, which has a particular lot number with the appropriate identifying particulars, administratively provided by the Land Office subject to the provisions of the National Land Code. Instead it is an asset owned by a company which is a creature of statute and subject to the rulings of the Registrar of Company. In a gist Clinic No. 6 which is the subject matter of the sale is one of the assets of the Physician Clinic Sdn. Bhd, a transaction which is no different to that of a legal firm being sold off without the building and land. From that interpretation the argument of the defendant that the clinic is an immovable property is absolutely unacceptable and certainly cannot be the basis for my interference. With regard to the issue of goodwill I seek some assistance from the case of *Joseph Zammit Bonett and Others and Joseph Axisa and Others* [1951] AC 62 which also strikes a similar chord to the current case. In that case a building was leased out as a cinema hall and was found for a fact to have enjoyed goodwill for that business. During the proceeding s. 2 of the Reletting of Urban Property (Regulation) Ordinance, 1931 was discussed in particular as to whether the concept of goodwill came within its definition. Under this section the definition of "premises" was only confined to urban immovable property. Their Lordships when discussing it, at p. 65 remarked:

Their Lordships consider that the judgments of the Maltese courts are right. Section 2 of the Ordinance confines the definition of "premises" to urban immovable property. Therefore movable property is outside the purview of the Ordinance. The definition of "shop" includes a cinema hall, but as the Ordinance only applies to immovable property it would not be reasonable to bring within its scope a hall to which is attached the goodwill of an established cinema business and which is furnished and equipped for the carrying on of that business.

One last issue of which I must decide is whether the portable heart machine is included in the consideration sum of RM175,000. This is a question of fact which must be decided after examining the contract documents and of which cl. 1(2) is relevant. This provision speaks of a transaction involving medicine, equipment and fittings in the clinic. Interestingly enough that clause specifically picks out the Aloka Sector Scan to be excluded from the contract. Having perused the three sub-clauses they appear to adequately cover the complete set-up required of a clinic which encompasses goodwill and practice of the late Dr. L.J. Rao, the medicine, equipment, and fittings in it. Aside from the above items and goodwill, the contract covers the shares of Wisma Medical Centre Sdn Bhd, the main body that operates the Straits Hospital in which the said clinic is housed. I see no necessity to rely on any contemporaneous documents as the documents which contain the fine prints of the contract are complete and crystal clear. I, not only must give the document its ordinary and plain meaning, but must construe the contract document as a whole and to determine its nature without being bound by the labels affixed on them. Naturally I did consider the meaning of the words used and avoided falling into the trap of speculating the subjective intention of the parties concerned. Having said the above and after having considered the lengthy submissions of both parties I am satisfied that the portable heart machine is already within the ambit of the agreements and is part of the contract sum.

Since I have gone through the evidence and law in some detail suffice for me to briefly pronounce my findings of fact now. They are

1. the clinic is not an immovable property within the meaning of s. 60(2) of Act 97;

2. the factor of goodwill is part of the contract and does not require the court's approval;

3. since goodwill is not subject to the court's approval as gauged from the contract, the report of an independent valuer is therefore unnecessary;

4. the portable heart machine is clearly part of the contract;

5. full payments have been made whereby the purchasers are beneficiaries of the contract; and

5. the approval of this court to be given is only as regards the shares and from the evidence available the court is satisfied that the value of RM1 each is reasonable and undisputed (see the estate duty documents. In fact the administrator strangely has refused to touch on it and I must assume that the price is good. Common-sense seems to indicate that the price is reasonable).

On that basis I order that

1. the sale of the shares go through as per the contracts;

2. the administrator is to transfer the shares to the purchaser;

3. to execute the prescribed transfer forms for purposes of effecting the transfer;

4. the transfer to take place seven days after the service of the order; and

5. cost against the defendant.